

FEDERAL COURT OF AUSTRALIA

Srou v Minister for Immigration and Multicultural Affairs [2006] FCA 1228

CORRIGENDUM

**OSSAMA MOHAMAD SROUR v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS AND MIGRATION REVIEW TRIBUNAL
NSD 2448 OF 2005**

**MOORE
ERROR: REFERENCE SOURCE NOT FOUND (CORRIGENDUM 21 SEPTEMBER
2006)
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 2448 OF 2005

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CORRIGENDUM

- 0 In line four of paragraph 57 on page 17 of the reasons for judgment the words "Federal Magistrate" should be deleted and replaced with the word "Tribunal".
- 1 On the cover page, the word "Mohammad" should be deleted and replaced with the word "Mohamad".

I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 21 September 2006

FEDERAL COURT OF AUSTRALIA

Srou v Minister for Immigration and Multicultural Affairs [2006] FCA 1228

MIGRATION – appeal from Federal Magistrates Court – application for spouse visa – where Tribunal not satisfied of spousal relationship and found no evidence to support alternative criteria including clause 100.221(4) of Sch 2 to the Migration Regulations 1994 – where evidence before Tribunal of child of relationship – whether evidence of informal access arrangements required to satisfy clause 100.221(4) – whether appellant satisfied criteria by reason of parental responsibility obligations under statute

WORDS AND PHRASES – ‘*has custody or joint custody of, or access to*’, ‘*any other formal maintenance obligation*’

Migration Regulations 1994 (Cth) Sch 2 clause 100.221(4)

Child Support (Assessment) Act 1989 (Cth) s 3

Fitch v Migration Review Tribunal [2004] FCA 1673 applied

Yazbeck v Minister for Immigration & Multicultural Affairs (2002) 124 FCR 458 discussed

**OSSAMA MOHAMMAD SROUR v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS AND MIGRATION REVIEW TRIBUNAL
NSD 2448 OF 2005**

**MOORE J
15 SEPTEMBER 2006
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 2448 OF 2005

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: OSSAMA MOHAMAD SROUR
Appellant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGE: MOORE J

DATE OF ORDER: 15 SEPTEMBER 2006

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. Subject to order 3, the first respondent pay the appellant's costs of the appeal.
3. The appellant pay the first respondent's costs thrown away by the adjournment of 26 April 2006.
4. Order 1 of the Federal Magistrates Court on 22 November 2005 be set aside and in lieu thereof it be ordered that:
 - (a) order in the nature of an order absolute in the first instance for a writ of certiorari to quash the decision of the Migration Review Tribunal made on 3 September 2004;
 - (b) order in the nature of a writ of mandamus directing the Migration Review Tribunal to hear and determine the applicant's application for Spouse (Migrant) (Class BC) visa according to law.
5. The Migration Review Tribunal be joined as second respondent

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 2448 OF 2005

BETWEEN: OSSAMA MOHAMAD SROUR
Appellant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGE: MOORE J

DATE: 15 SEPTEMBER 2006

PLACE: SYDNEY

REASONS FOR JUDGMENT

BACKGROUND

- 1 This is an appeal against a decision of Lloyd-Jones FM of 22 November 2005 dismissing an application for review of a decision of the Migration Review Tribunal ("the Tribunal") of 3 September 2004. The Tribunal affirmed the decision of the delegate of the respondent made on 23 April 2003 to refuse to grant the appellant a Spouse (Migrant) (Class BC) visa, subclass 100 ("the permanent visa").
- 2 The appellant, who is a national of Lebanon, had made an offshore application for the permanent visa and a Spouse (Temporary) (Class VF) visa, subclass 309 ("temporary visa") on 7 September 2000. The applications were based on his marriage to an Australian citizen, Ms Fatima Mustapha ("the sponsor"). The appellant claimed he had met the sponsor in Lebanon in July 2000 and they were married there on 13 August 2000. The appellant was granted the temporary visa on 6 December 2000 and arrived in Australia later that month.
- 3 The type of permanent visa for which the appellant applied usually cannot be granted until two years have lapsed after lodgement. On 20 June 2002, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") wrote to the appellant

requesting him to provide evidence he and the sponsor were still in a genuine and continuing relationship, for the purpose of assessing whether he was the spouse of the sponsor under clause 100.221(2) of Sch 2 to the *Migration Regulations 1994* (Cth) ("the Regulations") and therefore whether the permanent visa should be granted. The Department wrote a similar letter to the appellant on 15 January 2003. The Department did not receive a response to the letters.

4 On 10 April 2003, the sponsor telephoned the Department, advising that she and the appellant were no longer in a relationship and that she had taken an apprehended violence order (AVO) against him. By letter dated 23 April 2003, the Department advised that the application for the permanent visa had been refused. The delegate was not satisfied that the appellant was the spouse of the sponsor, as defined in Reg 1.15A of the Regulations. In particular, there was no evidence that they were in a "genuine and continuing relationship" as required by Reg 1.15A. The appellant therefore did not satisfy clause 100.221(2). The delegate considered the alternative criteria which did not require the existence of a spousal relationship and found that none were satisfied.

5 By letter received by the Department on 7 May 2003, the sponsor advised the Department that she had reconciled with the appellant. She also advised that they were living together and had a 14 month old daughter. On 12 May 2003, the Department wrote to the appellant advising that the application could not be further considered. The appellant's application for review was then lodged on 26 May 2003.

LEGISLATION

6 For the permanent visa, there are no criteria to be satisfied at the time of making an application. At the time of decision, an applicant must satisfy clause 100.221(1) of Sch 2 to the Regulations. That clause in turn requires an applicant to satisfy clause 100.221(2), (2A), (3), (4) or (4A). Clause 100.221(2A) provides:

The applicant meets the requirements of this subclause if:

- (a) the applicant is the holder of a Subclass 309 (Spouse (Provisional)) visa which the Minister has decided, under section 345, 351, 391, 417, 454 or 501J of the Act, to grant to the applicant; and*
- (b) the **applicant is the spouse of the sponsoring spouse**; and*
- (c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the Minister made the decision mentioned in paragraph (a).*

7 (emphasis added)

8 The term "spouse" is defined in reg 1.15(1) as being two persons in either a married or de facto relationship. Under reg 1.15(1A), persons are in a married relationship if:

- (a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*

9 Clause 100.221(4) provides that:

The applicant meets the requirements of this subclause if:

- (a) *the applicant first entered Australia as the holder of a Subclass 309 (Spouse (Provisional)) visa and either:*
 - (i) *continues to be the holder of that visa; or*
 - (ii) *is no longer the holder of that visa because the visa:*
 - (A) *was granted before 1 November 1999; and*
 - (B) *has ceased to be in effect because the applicant:*
 - (I) *was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or*
 - (II) *left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and*
- (b) *the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring spouse has ceased; and*
- (c) *after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a) -- either or both of the following circumstances applies:*
 - (i) *either or both of the following:*
 - (A) *the applicant;*
 - (B) *a member of a family unit of the sponsoring spouse or of the applicant or of both of them;**has suffered domestic violence committed by the sponsoring spouse;*
 - (ii) *the applicant:*
 - (A) *has custody or joint custody of, or access to; or*
 - (B) *has a residence order or contact order made under the Family Law Act 1975 relating to;**at least 1 child in respect of whom the sponsoring spouse:*
 - (C) *has been granted joint custody or access by a court; or*
 - (D) *has a residence order or contact order made under the Family*

Law Act 1975; or
(E) has an obligation under a child maintenance order made under
the Family Law Act 1975, or any other formal maintenance
obligation.

10 "Custody" is defined in reg 1.03 as follows:

"Custody", in relation to a child, means:

- (a) the right to have the daily care and control of the child; and*
- (b) the right and responsibility to make decisions concerning the daily care and control of the child.*

THE TRIBUNAL'S DECISION

11 The events leading up to the Tribunal's decision require some explanation. On 22 April 2004, the Tribunal wrote to the appellant inviting him to comment on information in the Departmental file indicating the sponsor had taken out an AVO against him and that they were no longer in a spousal relationship. The appellant responded by letter dated 24 April 2004 indicating that although the AVO had been taken out, "we have since resolved our issues and there has been no violence since". He also stated that he and the sponsor lived together and that they had a daughter. On 28 April 2004, the Tribunal again wrote to the appellant, inviting the appellant to appear before the Tribunal at a hearing and provided the relevant hearing details. The letter stated that the Tribunal wished to take oral evidence at the hearing from the appellant as well as from the sponsor. On 10 May 2004, the Tribunal received a completed "response to hearing invitation form", which was signed by the sponsor. In response to the typed statement "I request that the Tribunal take oral evidence from" was written "English Fatima Mustapha, his wife". Under "I request that the Tribunal obtain the following written evidence or written materials" was written the sponsor's address and name, followed by the words "his wife".

12 On 12 May 2004, the Tribunal received a letter from the sponsor advising that she wished to "withdraw her sponsorship application", because her husband had been "very bad" to her and was using her so he could stay in Australia. She claimed that he abused and swore at her and did not support her financially. She also advised that she was now residing apart from him with their daughter.

13 The appellant did not appear at the hearing scheduled for 27 May 2004. However, on that day, an employee of the Tribunal, Micaela Callan, made a file note or minute in relation to a conversation she had in person with the sponsor. Based on the minute, the conversation

included the following. Ms Callan told the sponsor that she no longer had standing in the case and could not appear for the appellant. The sponsor informed Ms Callan that the appellant did not know about the hearing because she had not told him. She also said that although she was living with the appellant, he did not deserve to be granted a visa because he did not support her financially. The sponsor asked whether a visa would be granted because of their daughter, to which Ms Callan replied that the Tribunal would take the daughter into account. The sponsor also asked whether she could change the address to which the decision record would be sent. Ms Callan informed her that a change of address could not be accepted from the sponsor because she lacked standing. At the end of the minute, Ms Callan recorded that she would bring the details contained in that minute to the Tribunal member's attention and would also tell the member of her concerns that the sponsor might try to continue to intercept the appellant's mail.

- 14 Apparently in response to the details contained in the minute, the Tribunal wrote to the appellant inviting him to comment, in writing, on the information that "Your sponsor has withdrawn her nomination in support of your application". The letter also advised as follows:

"There are three circumstances where you may continue to be considered for grant of permanent residence on spouse grounds, despite the fact that the relationship has ended. These are where:

...

- C. You have custody, joint custody or access to; or a residence order or contact order made under the Family Law Act 1975 relating to at least 1 child in respect of whom the sponsoring spouse has been granted custody or access or maintenance obligations."*

- 15 The letter then provided as follows:

"The Tribunal has noted reference to a child that you have with the sponsoring spouse. Section 359(2) of the Migration Act allows the Tribunal to invite a person to provide additional information that it considers relevant to the review of a migration decision. The Tribunal invites you to provide the following information:

- a certified copy of your daughter's birth certificate;*
- advice about any custody or joint custody or access arrangements that you and your wife have in respect of your daughter including informal arrangements and/or residence orders or contact orders under the Family Law Act 1975;*
- any obligation you have under a child maintenance order under the Family Law Act 1975, or any other formal maintenance obligation."*

- 16 No response was received.

17 It appears that by at least 5 August 2004, the Tribunal member had determined to decide the matter on the papers. This is based on a minute of 5 August 2005 by an employee of the Tribunal advising the Tribunal member that the date by which the appellant was to respond to the letters of 3 and 4 June 2004 had passed, and asking whether the member wanted to "decide on paper or set a hearing". The member's direction as recorded on that minute was that the appellant had failed to attend the scheduled hearing and she would therefore finalise the matter on the papers.

18 On 16 August 2004, the Tribunal wrote to the appellant indicating that it had made a decision and invited him to the handing down of the decision. A statement of decision together with the Tribunal's reasons was faxed to the appellant on 17 September 2004.

19 In its decision, the Tribunal noted that no evidence had been provided to support the contention that the relationship was "genuine and continuing". The Tribunal recorded that, in determining whether the appellant was the sponsor's spouse, it must take into account the considerations set out in Reg 1.15A(3). These included the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of their commitment to each other. It noted that the only evidence about financial arrangements between the appellant and the sponsor which had been provided was the evidence of financial circumstances provided in support of an application for fee waiver. The Tribunal was not satisfied from that material that there was any joint ownership of assets, joint liabilities or any pooling of financial resources.

20 The Tribunal acknowledged the possibility that the appellant had not received some of the correspondence from the Department and the Tribunal, for the reason that the sponsor had not passed it on to him or because no one had translated it for him. It also noted that, based on the minute, "[t]he sponsor told the Tribunal that she did not tell the visa applicant about the hearing date". However, in the Tribunal's opinion, the appellant could be taken to be aware that the application was under review because he would have known that the temporary visa was granted for two years only and also because he had responded to the Tribunal's letter dated 22 April 2004. It also expressed the view that the appellant was under an onus to follow up his application and provide supporting documentation.

21 It noted also the previous advice received by the Tribunal and the Department that the

appellant and sponsor were not living together, and that there was no information before the Tribunal on the current living arrangements or social aspects of the relationship. It was not satisfied that the two were living together and concluded that they were not in a spousal relationship. Subclause 100.211(2) was therefore not satisfied.

- 22 The Tribunal considered whether the appellant met any of the alternative subclauses for the purposes of fulfilling the requirement of subclause 100.221(1). The Tribunal noted that it had seen a Centrelink statement dated 23 May 2003 indicating that the sponsor had a child and had written to the appellant inviting him to provide certain information relating to his daughter, but that it had not received any response. The Tribunal found that there was no evidence to support a conclusion that any of subclauses 100.221(3), (4) and (4A) were satisfied, and affirmed the decision under review.

THE FEDERAL MAGISTRATE'S JUDGMENT

- 23 By application filed 7 October 2004, the appellant sought judicial review of the Tribunal's decision in the Federal Magistrates Court. The grounds identified in the application were as follows:

1. *Failing to hold the hearing to which it had invited the unrepresented applicant.*
2. *Taking what it claimed to be evidence from an unsworn hearsay account of a conversation between a counter staff member and the [sponsor].*
3. *Failing to put the further allegations contained in the said unsworn hearsay account of a conversation between a counter staff member and the [sponsor] to the unrepresented applicant.*
4. *Failing to allow the unrepresented applicant the opportunity to respond.*
5. *Founding its decision partly or wholly upon the said unsworn hearsay account of a conversation between a counter staff member and the [sponsor].*

- 24 In relation to the first ground, his Honour held that the Tribunal had duly invited the appellant to attend a hearing as required by s 425(1) of the Act. Even if the appellant had not become aware of that invitation, the letter was taken to have been given to him in accordance with s 441C because it had been given to him by one of the methods prescribed in s 441A. His Honour also found that the Tribunal had complied with its obligations under s 360 in relation to the information it obtained from Micaela Callan's conversation with the sponsor, by its letters dated 3 and 4 June whereby the appellant was invited to provide additional

information.

25 The remaining grounds centred on the minute of 27 May 2004. The appellant's then solicitor, Mr Newman of Newman & Associates, claimed that the minute evinced a denial of natural justice by the Tribunal. It was submitted that Ms Callan's advice to the sponsor that she no longer had standing was incorrect, because the sponsor was the legitimate representative of the appellant and was there to represent the appellant at the hearing. It was further submitted that Ms Callan had purported to exercise functions of the Tribunal by shutting out the sponsor's evidence, in possible breach of ss 354 and 357 of the Act.

26 His Honour also observed that the decision in respect of the sponsor's standing was not necessarily made by Ms Callan, or at least not made in isolation or without the authority of the Tribunal member, since the Tribunal decision addressed the issue of standing at [26] of its reasons. The Federal Magistrate appeared to conclude that the Tribunal had approved of what had occurred or had adopted Ms Callan's decision, if it can be so described, as its own.

27 His Honour also noted, in the context of the contentions made by Mr Newman regarding the minute, that (at [21]):

"It remains unclear as to what information the applicant had received and whether it was his election for the wife to appear at the hearing and represent him. From the documents contained in the Court Book there is a strong possibility that the applicant was completely unaware of these activities and whether his interests were being represented".

28 His Honour emphasised that the appellant's solicitor had not attempted to provide any evidence, such as by calling the appellant to give evidence or filing of affidavit material, to support many of the contentions he made. His Honour was not satisfied that the Tribunal had committed jurisdictional error.

THE APPEAL

29 When the matter was first listed for hearing on 26 April 2006, the appellant's then solicitor, Mr Newman, sought to raise a ground of appeal which appeared to be one of substance but in respect of which adequate notice had not been given. That issue related to whether, in the unusual circumstances of the case, the Tribunal was entitled to proceed to determine the review under s 426A of the Act without taking any further action, in light of the decision of North J in *Fale v Minister for Immigration and Multicultural Affairs* [2001] FCA 1645.

Leave was granted for the filing of an amended notice of appeal and the hearing adjourned. The appellant has since changed solicitors. On 15 May 2006, an amended notice of appeal was filed. At the hearing on 7 June 2006, the Minister raised concerns that the amended notice of appeal and submissions filed by the appellant went beyond the scope of matters foreshadowed on 26 April 2006, which had given rise to the grant of leave. The hearing proceeded on the basis that any prejudice to the Minister could be remedied by written submissions, and the issue potentially having some bearing on the costs order made.

30 As emerged at the hearing on 7 June 2006, the appellant's main argument (in substance, the only ground now pursued) is that he satisfies items (A) and (E) of clause 100.221(4) of Schedule 2 of the Regulations and that the Tribunal and Federal Magistrate erred by failing to ask the necessary questions and ignored relevant material, namely provisions of the *Family Law Act 1975* (Cth) ("Family Law Act") and the *Child Support (Assessment) Act 1989* (Cth) ("Assessment Act"). The appellant relied on the decision of Dowsett J in *Fitch v Migration Review Tribunal* [2004] FCA 1673.

31 The appellant's argument is as follows. In relation item (A), the appellant relied on s 61C and s 61D of the Family Law Act. Under s 61C(1) of the Family Law Act, a parent has parental responsibility for a child to the extent that it is not displaced by a parenting order of the Court, and under s 61C(2), that legal position is not affected by changes in the nature of the parents' relationship, such as separation. Section 61B explains what parental responsibility means. Section 61D sets out the effect of a parenting order. Since there was no evidence before the Tribunal of any court order affecting the appellant's parental responsibility, the Tribunal should have taken as given that it was intact and he had joint custody of his daughter.

32 The minute of 27 May 2006 was also said to be relevant to item (A). It was submitted that the Tribunal should have drawn the inference from the sponsor's statement she was now living with the appellant that their young daughter would also be living with them. On that basis, the Tribunal should have concluded that not only did the appellant have parental responsibility, but also that by living with her he was necessarily exercising a measure of day to day care for the daughter's welfare and development. He therefore satisfied item (A).

33 Secondly, the appellant satisfied the second of the two alternate requirements in item (E)

which requires the sponsoring spouse has "any other formal maintenance order". This was said to arise by reason of s 3(1) of the Assessment Act, which provides as follows:

The parents of a child have the primary duty to maintain the child.

34 The appellant submitted that no evidence was required in order for the Tribunal to conclude that item (E) was satisfied in the way contended.

Whether the Tribunal erred in finding the appellant did not satisfy par 100.221(4)

35 The construction of the wording in clause 100.221(4)(c)(ii) has previously been considered in two decisions of this Court, in both cases by a single judge. The first is the judgment of Sundberg J in *Yazbeck v Minister for Immigration & Multicultural Affairs* (2002) 124 FCR 458 ("*Yazbeck*"). The applicant in that case had been refused a permanent visa of the same type as that applied for in the present case. Also as in the present appeal, the delegate had refused to grant the permanent visa on the basis that the relationship was not genuine and continuing, and the Tribunal reached the same view. In his amended application in this Court, the applicant contended that the Tribunal had erred in not finding that he satisfied items (A) and (E) of subclause 100.221(4). The Tribunal had before it evidence that the applicant had recently seen the two children of his marriage to the sponsor at a cousin's house, which the applicant claimed established that he had "access" to the children for the purposes of item (A). The applicant relied on s 66C of the Family Law Act for the claim that his former spouse had a "formal maintenance order" for the purposes of par (E). Subsection 66C(1) of the Family Law Act, which is virtually identical to s 3 of the Assessment Act, provides:

The parents of a child have, subject to this Division, the primary duty to maintain the child.

36 In construing item (A), his Honour considered the relationship between subclause 100.221(4) and the amendments to the Family Law Act (at [7] – [9]). Prior to amendments effected by the *Family Law Reform Act 1995* ("the 1995 Act"), Part VII of the old Act had provided for custody and access orders. The 1995 Act introduced "parenting orders", in a new Part VII, to replace those orders. His Honour set out s 64B of the Family Law Act which defines a "parenting order" as dealing with any aspect of parental responsibility for a child, including with whom the child is to live ("residence orders") and contact between the child and another person or persons ("contact orders"). Subclause 100.221(4)(c)(ii) uses both the old terms "custody" and "access", as well as the new terms "residence" and "contact", and was intended

by the drafters to accommodate both types of orders. His Honour then considered the discrepancy in the words between items (A) and (B), being that (B) expressly referred to orders made under the Family Law Act whereas item (A) does not. His Honour concluded that the omission of a reference to orders in item (A) was to be explained by bad drafting. His Honour found that this view was supported by the terms of item (C) which refers to the situation where the spouse was granted "joint custody or access by a court". His Honour described items (A) and (C) as "counterparts", explaining this description by giving the example that clause (C) deals only with the sponsor having joint custody because clause (A) deals with (sole) custody.

37 Having found that "custody" and "access" in item (A) referred to the concepts under the old Family Law Act, his Honour concluded that the Tribunal had been correct in finding that there was no evidence of custody or access before it. His Honour noted that "There was no evidence that a court order existed that entitled the applicant to access the children" (at [9]).

38 However, his Honour should not necessarily be taken to have excluded the possibility that something less than a court order could establish "access". His Honour said, at [10]:

"Even if a person can, for the purposes of subclause 100.221(4)(ii)(A), have access to a child in the absence of a court order granting access, the applicant does not establish that he "has access" simply because he happens to have seen the child, whether close up or in the distance. Evidence that the applicant "saw his children recently and his wife at a cousin's house" does not established that he has access to his children."

39 It must be said, however, that his Honour does appear to indicate a view that the lack of any reference to court orders in item (A) was merely a drafting oversight.

40 Having found that item (A) was not satisfied, his Honour said that the applicant's case would not be assisted even if he succeeded in his claims in relation to item (E). Nevertheless, his Honour turned to consider whether the applicant's spouse had a formal maintenance obligation for the purposes of item (E) by virtue of s 66C(1) of the Family Law Act. His Honour broke up item (E) into two limbs, being "an obligation under a child maintenance order made under made under the *Family Law Act 1975*" and "any other formal maintenance obligation". The first limb was a type of order under the Family Law Act specifying the amount of maintenance to be provided. His Honour found that the type of obligations to which the second limb was directed was maintenance agreements made in writing by the

parties to a marriage addressing the maintenance of a child, and which are regulated by the Family Law Act. It was not clear whether or not his Honour viewed this as being the only type of obligation which would satisfy the second limb.

41 His Honour also considered the result of the applicant's contention in relation to s 66C, if it was accepted. His Honour said (at [12]):

"If the duty imposed by s 66C(1) were a "formal maintenance obligation", pars (C) and (D) would be rendered unnecessary as would the first limb of par (E). Any applicant whose relationship with the sponsoring spouse had ceased, and who satisfied par (A) or par (B) would, as a result of s 66C(1), automatically satisfy the second limb of par (E). This would be an absurd result which is avoided by the approach I favour. Thereby effect is given to pars (C) and (D) and both parts of par (E), rather than rendering pars (C) and (D) and the first part of par (E) ineffectual."

42 The second decision is *Fitch*. In that case, the Minister's delegate refused to grant the visa applicant a Subclass 801 visa, a permanent spouse visa. At the time of the decision whether to grant the visa, an applicant must satisfy clause 801.221(1) of Sch 2 of the Regulations which requires that the applicant meets the requirements of one of clauses (2), (2A), (3), (4), (5), (6) or (8). Clause 801.221(6)(c)(ii) is identical to clause 100.221(4)(c)(ii). The applicant's relationship to the sponsor had ended. In the Tribunal, the applicant claimed that clause (6) was satisfied because he satisfied item (6)(c)(ii)(A) and his sponsor satisfied item (6)(c)(ii)(E), in relation to the son of their relationship. There was evidence before the Tribunal, in the form of a statutory declaration, that the applicant and the sponsor had an informal agreement whereby the applicant saw his son on particular days and alternate weekends and contributed financially to his upkeep. The Tribunal found that the visa criteria were not satisfied. It found that there was no evidence before it of a Court order under the Family Law Act granting access, joint custody or residence, nor was their evidence that the applicant had an obligation under a child maintenance order under that Act "or any other formal (and accepted) maintenance obligation" (see [7] of his Honour's reasons).

43 In this Court, the applicant submitted that the Tribunal had erred in its construction of items (A) and (E) in three respects. The Minister conceded one ground, namely that the Tribunal had construed the alternative criteria in items (C), (D) and (E) as referring to the visa applicant rather than the sponsoring spouse. However, the Minister contended that the application would have failed for other reasons. The two other grounds urged by the applicant were (1) that informal arrangements under which an applicant has custody, joint

custody or access can satisfy item (A), and; (2) the sponsoring spouse may have a "formal maintenance obligation" for the purpose of item (E) even in the absence of a court order or other formal arrangement.

44 Dowsett J concluded that both items (A) and (E) were satisfied. In relation to item (A), his Honour found that the applicant had "custody" or "joint custody". His Honour considered the definition of "custody" in the Regulations and the definition of "parental responsibility" in s 61B of the Family Law Act, concluding that the two expressed "the same core concept" and neither purported to "create new rights or obligations" (at [14]). His Honour considered that the content of the term "custody" as used in the Regulations depended upon the Family Law Act as well as the general law and other statutes. In that context, his Honour found that "parental responsibility" and "custody" were not matters of strict legal rights but were more in the nature of parental obligations. His Honour said (at [24]):

"It follows that the present applicant has parental responsibility for his child, including either custody or joint custody of him. I see no reason to conclude that the informal arrangements in place between him and his sponsoring spouse make any difference to the custody situation."

45 Having found that the applicant had custody or joint custody, it was not necessary to address whether the applicant had "access". However, his Honour noted that the term "access", not defined in the Regulations, was traditionally used to describe contact arrangements between a non-custodial parent and his or her child. His Honour said (at [25]) that "I see no reason to conclude that access arrangements must be pursuant to a court order if they are to satisfy item (A)".

46 In relation to the sponsoring spouse satisfying item (E), his Honour noted the common law responsibility of a parent to maintain a child, which was recognised and enforced by statute (referring specifically to s 286 of the Queensland *Criminal Code* and s 15 of the *Maintenance Act 1965* (Qld)). His Honour noted that at all relevant times the sponsoring spouse was under a statutory obligation to maintain her child, and concluded that such obligation constituted a "formal maintenance obligation".

47 Dowsett J was mindful of the apparent inconsistency with Sundberg J's decision in *Yazbeck* and discussed that decision at some length, at [30] to [38]. Prior to considering the decision in *Yazbeck*, Dowsett J considered the meaning of "residence order", "contact order" and

"child maintenance order" used in items (B), (D) and (E), and notes that the terms were introduced by the 1995 amendments to the Family Law Act. His Honour also notes that prior to the 1995 amendments, the terms "custody orders", "access orders" and "maintenance orders" were traditionally used and the meanings of those terms.

48 Dowsett J agreed with Sundberg J's conclusion in *Yazbeck* that the Tribunal in that case had correctly concluded that the applicant did not have access on the basis of having recently seen his children at a cousin's house. Dowsett J's reasoning was that "Item (A) contemplates some form of continuing access rather than one previous incident of contact" (at [31]). His Honour then went on to consider the aspects of Sundberg J's judgment which appeared to go further. First, there was the issue of the relevance of the express reference in items (B), (D) and (E) to orders "made under the Family Law Act 1975", and to rights granted "by a court" in the case of item (C), whereas item (A) does not contain any such a reference. Dowsett J did not accept Sundberg J's analysis, concluding it was more likely to reflect "deliberate decisions than bad drafting" (at [32]). In reaching this conclusion, his Honour did not embrace Sundberg J's approach to items (A) and (C) as "counterparts", which analysis had apparently been a major part of Sundberg J's reasoning. Dowsett J observed that an approach to items (A) and (C) as counterparts seemed to assume that only the visa applicant and sponsor had any direct interest in the relevant child, whereas there was no reason to assume this, especially since there was no requirement that the child be the biological child of either person. His Honour also observed that, even assuming only the visa applicant and sponsor had direct links, item (C) does not provide a counterpart to item (A) for a case where a visa applicant has "access", since sole custody by the sponsor will not satisfy item (C). Although his Honour discusses some possible purposes of items (A) to (E) and their interaction (at [33]), his ultimate view was that it was very difficult to understand these matters entirely, and that the best course was probably "to give each item its natural meaning, unless some absurdity results" (at [35]).

49 Dowsett J considered Sundberg J's conclusion that item (A) was intended to deal with custody and access orders under the old Family Law Act. Dowsett J noted that, as Sundberg J had himself pointed out, the amended Act gives effect to orders made under the old Act (custody and access orders) as if they were orders made under the amended Act (residence and contact orders). On that basis, his Honour concluded that item (B) applied both to orders made under the old Act and the amended Act, and that item (A) must have

been intended to deal with arrangements other than orders made under the old Act (at [36]).

50 Dowsett J considered Sundberg J's conclusion that an absurdity would arise if s 66C of the Family Law Act satisfied item (E). Dowsett J did not accept with Sundberg J's analysis that where a visa applicant satisfied item (A) or (B), the second limb of item (E) would automatically be satisfied, and that items (C) and (D) would thereby be rendered unnecessary. Dowsett J noted this analysis again assumed that the relevant child must be the biological (or perhaps adopted) child of either the visa applicant or the sponsor. Since s 66C applies only to "parents" (which exclude, for example, step-parents), and yet orders referred to in items (C) and (D) can be made in respect of non-parents, items (C) and (D) still had work to do. On Dowsett J's reasoning, the second limb of item (E) would not automatically be satisfied where a visa applicant satisfied items (A) or (B) since it could not be assumed that the sponsor was a parent for the purposes of s 66C.

51 Dowsett J also considered the policy implications of construing item (A) as requiring court orders, telling against the construction favoured by Sundberg J (at [34]):

"... I see no reason why the Migration Regulations would discriminate, for present purposes, between recognized rights and obligations existing at law, but not evidenced in any order or other "formal" document, and rights and obligations which are so evidenced. Such discrimination would encourage unnecessary litigation".

52 His Honour also questioned (at [32]) "why *bona fide* consensus as to a child's welfare should not be sufficient", in the context of considering why item (A) should be construed as requiring court orders.

53 Dowsett J concluded by expressing his reluctance in reaching a different conclusion on item (E) than Sundberg J, adding that it was arguable that Sundberg J's decision on the issue did not form part of the ratio. Dowsett J also offered as explanations for the different decision that it "was based upon the evidentiary shortcomings of the applicant's case" and that "his Honour did not have the benefit of argument on the wider aspects of the matter" (at [39]).

Submissions on Fitch and Yazbec

54 Counsel for the appellant submitted that *Fitch* established that once a child is born in Australia of parents living in Australia, one of whom in this case is an Australian citizen, that the father and the mother stand in a statutory relationship to that child by virtue of the

provisions of the Family Law Act. That statutory relationship obviates the need for a visa applicant to produce evidence of even make submissions in order to satisfy the requirement contained in clause 100.221(4)(c)(ii). It should also be noted that counsel for the appellant submitted that Dowsett J's reference to ss 61C and 66C of the Family Law Act was incorrect as s 3 of the Assessment Act would apply in relation to the child in *Fitch* as well as in the present case, but nothing turns on that since the provisions are the same in substance.

55 Counsel for the Minister, submitted that *Fitch* did not go so far as the appellant contended. What Dowsett J concluded was that the level of formality required to satisfy the relevant criteria was not stringent, but not that the statutory relationship between parent and child obviated the need for evidence and submissions. As the Tribunal correctly stated, there had been no evidence before it that the criteria in clause 100.221(4)(c)(ii) were met. The Tribunal could not sensibly have accepted the minute as proof that the appellant had responsibility for the daughter's day to day welfare and that there was a joint custody arrangement. It could equally have been presumed from the minute that the appellant was failing to care for or support their daughter.

56 Counsel for the Minister also submitted that, in any event, *Yazbec* should be preferred to *Fitch*. She submitted that, following *Yazbec*, the Tribunal did not have before it evidence of a formal maintenance obligation and did not err by proceeding to make a decision under s 359A when such information was not forthcoming. The main basis on which it was contended that *Yazbec* should be preferred was that Sundberg J took a more thorough and orthodox approach to statutory construction, particularly in relation to the term "formal maintenance obligation" in item (E). Counsel contended that the approach of Dowsett J in *Fitch* gave no meaning to the term "formal", rendering it otiose and with no work to do. This was contrary to a proper approach to statutory construction. It was submitted that Dowsett J did not undertake a proper assessment of the term "formal maintenance obligation" in reaching his conclusion and, in particular, that he did not consider the difference between a maintenance obligation and a *formal* maintenance obligation, whereas Sundberg J did analyse this issue (at [12]).

57 Although it was accepted that the statutory provisions relied upon by the appellant might be maintenance obligations, they were not "formal" ones. Two main reasons were advanced as to why the statutory provisions did not amount to formal maintenance obligations. First,

there were no cogent and discernible terms of any such provisions, nor specific details as to amount or other arrangements. Secondly, the statutory provisions were not enforceable or ascertainable without some other process or order or explicit agreement between the parties under the Assessment Act. An application to a court or other body was required before the rights or obligations contained in any of the sections could come to fruition.

Consideration

58 It is well established that a judge of this Court should follow the earlier judgment of another judge unless satisfied that the earlier judgment was plainly or clearly wrong: *Marr v Australian Telecommunications Corporations* (1991) 34 FCR 82 at 85 per Hill J; *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at [74]-[76] and *Bank of Western Australia Ltd v Commissioner of Taxation* (1994) 55 FCR 233 at 255. While not expressed in those terms, it must be assumed that Dowsett J took that view of the reasoning of Sundberg J. In my opinion, the approach of neither Sundberg J nor Dowsett J is plainly or clearly wrong. There is no principle of which I am aware which would guide me in deciding which of the earlier judgments should be preferred in order to maintain judicial comity. However, Dowsett J's judgment is the more recent judgment and for that reason is more likely, I would assume, to be the judgment on which decision-makers presently having to apply the relevant regulations, would base their decisions. Further, Dowsett J's reasoning is, in my opinion, marginally more compelling.

59 In its decision, the Tribunal indicated that it was aware that the appellant and the sponsor had a child. It said there was no evidence that the appellant had custody or joint custody of or access to a child in respect of which the sponsor had, amongst other things, a formal maintenance obligation. However, on the reasoning of Dowsett J, the appellant had a right to custody as incident of the statutory imposition of parental responsibility by operation of the Family Law Act and the sponsor had a formal maintenance obligation (though by operation of the Assessment Act rather than the Family Law Act). The Federal Magistrate fell into jurisdictional error in not recognising this. It may be accepted that this approach would result in the satisfaction of some of the relevant criteria in all circumstances where a visa applicant and the sponsor had a child in respect of whom Australian law operated. If that is an inconvenient or unintended result then the Regulations can be amended. I should add that in this case, there were arguably some procedural irregularities flowing from the sponsor's behaviour which meant that the appellant may not have been treated entirely fairly though

whether any of this would have amounted to jurisdictional error is a question that was ultimately not raised for consideration.

60 The appeal should be allowed, the judgment of the Federal Magistrate set aside, the decision of the Tribunal set aside and the matter remitted to the Tribunal for further consideration according to law. The appellant should have his costs of the appeal, though should pay the Minister's costs thrown away by the adjournment of 26 April 2006. I do not propose to vary the costs order of the Federal Magistrate of 22 November 2005. The issue raised in those proceedings were ultimately not pursued in this appeal and the appellant has succeeded on a point not raised below.

I certify that the preceding fifty eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 15 September 2006

Counsel for the Appellant: J Shaw (7 June 2006)

Solicitor for the Appellant: Newman & Associates (26 April 2006)
H M Symonds and Britten (7 June 2006)

Counsel for the First Respondent: S A Mason

Solicitor for the First Respondent: Phillips Fox

Dates of Hearing: 26 April 2006, 7 June 2006

Last date for submissions: 19 June 2006

Date of Judgment: 15 September 2006